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The Mountain States Telephone and Telegraph Company v. Woods : Response to Petition for Rehearing

Utah Court of Appeals

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DeLoy M. Sallenback; Attorney for Respondent.

James D. Porter; Floyd A. Jensen; Attorneys or Appellant.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 870085-CA

IN THE UTAH COURT OF APPEALS

THE MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY,

:

Plaintiff and Appellant,

:

vs.

:

Civil No. 870085-CA

KEVIN J. WOODS and CALVIN D.
LEACH,

:

136

:

Defendants and Respondents.

RESPONSE TO PETITION FOR REHEARING

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Court of Appeals

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RESPONSE TO PETITION FOR REHEARING

Pursuant to Rule 35 of the Rules of the Utah Court of Appeals, defendant, Calvin D. Leach, by and through his attorney of record, DeLoy M. Sallenback, responds to petition of plaintiff for Rehearing to this Court.

MEMORANDUM

The Respondent, Calvin D. Leach, submits this Memorandum in support of his Response to plaintiff's Petition for Rehearing.

Trial of the above-entitled matter was held December 16, 1986, and judgment in respect thereto was entered on January 22, 1987.

Facts as set forth in Appellant's Memorandum portion of its Petition for Rehearing are solely, as they apply to actions of Appellant, within the knowledge of Appellant. Appellant does not, however, in said Memorandum indicate whether any fee actually accompanied its initial mailing of the Notice of Appeal - reference being only to "proper fee" or "correct fee". Respondent accordingly cannot properly determine whether he agrees with said facts in that regard, or not.

On April 16, 1987, the Utah Court of Appeals dismissed the appeal of Appellant.

Argument

FAILURE TO PROPERLY FILE AN APPEAL AFFECTS
JURISDICTIONAL VALIDITY OF AN APPEAL

Rule 3 (a) of the Utah Court of Appeals states:

"As defined and provided by law, an appeal may be taken from the final orders and judgments of the district court, juvenile court, or circuit court to the Court of Appeals by filing a notice of appeal with the clerk of the particular court from which the appeal is taken within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is a ground only for such action as the Court of Appeals deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal as well as the award of attorney fees."
(emphasis added.)

Rule 4 (a) provides:

"In a case in which an appeal is permitted as a matter of right from the district court, juvenile court, or circuit court to the Court of Appeals, the notice of appeal required by Rule 3 shall be filed with the clerk of the court from which the appeal is taken within 30 days after the date of entry of the judgment or order appealed from."
(emphasis added).

The Utah Rules of Appellate Procedure have been wholly superceded by the Rules of the Utah Court of Appeals which became effective January 13, 1987, prior to the appeal filed in the above-entitled matter. Accordingly any references to Utah Rules of Appellate Procedure as they may be argued to apply in this case are irrelevant.

Rule 3 (f) of the Rules of the Utah Court of Appeals states:

"At the time of filing any separate or joint notice of appeal in a civil case, the party taking appeal shall pay to the clerk of the court from which the appeal is taken such filing fees as are established by law and also the fee for docketing the appeal in the Court of Appeals. The clerk of the court from which the appeal is taken shall not accept a notice of appeal unless the filing and docketing fees are paid." (emphasis added).

In respect to the above Rule requirements, except for filing the notice of appeal timely, any other steps in respect to an appeal is subject to "...only such action as the Court of Appeals deems appropriate,..."

It is respectfully submitted that appellant has clearly missed the point of Rule 3 (a) since it argues not paying a proper filing fee falls into the exception provision. Clearly such is not the case.

Appellant must file with the clerk of the court being appealed from the proper fee for that court as well as the fee for docketing the appeal in the Court of Appeals. The presentation of the Notice of Appeal and the proper filing fees are conjunctive, not disjunctive. Appellant has not advised in its Memorandum whether any fee at all was sent with the Notice of Appeal; whether, if one was sent, it was the appropriate one for the circuit court, but not the appropriate one for the docketing in the Court of Appeals, or whether it was not the appropriate one for the circuit court, but was the appropriate one for the docketing in the Court of Appeals, or, even further, not the proper one for either.

The clerk of the circuit court cannot accept a Notice of Appeal unless accompanied by the proper fees. Accordingly, the fees being incorrect, the clerk not having authority to accept same for filing, the Notice of Appeal is ipso facto not filed. The fact that at some time after the expiration of 30 days the proper fees accompanied the Notice of Appeal such as to enable the clerk to believe it was acceptable for filing does not imbue the Notice of Appeal with timely filing. No timely filing is no filing.

The provisions of Rule 3 (a) and (f) not having been met, the provisions of Rule 4(a) that the filing be within 30 days after entry of the judgment appealed from, apply. The timeliness of filing is critical to the appeal existing at all. Without timely filing the appeal does not exist. The Utah Supreme Court dealing with an instance of new Rules, in Utah Sand & Gravel Product Corp. v. Tolbert 16 Utah 2d 407, 402 P.2d 703 , analyzed an issue of timeliness as follows:

" It is true that our new Rules of Civil Procedure were intended to eliminate undue emphasis on technicalities and to provide liberality in procedure to the end that disputes be heard and determined on their merits. However, this does not mean that procedure before the Courts has become entirely "without form and void." The law itself is a system of rules designed to safeguard rights and preserve order, and administration of justice under it must necessarily be carried on with some degree of order. This can be accomplished only by compliance with the rules established for that purpose."

Appellant refers to State v. Johnson, 700 P.2d 1125 (Utah 1985). In that case, criminal rather than civil, the court determined filing

of the notice of appeal and paying the fee must both be done prior to the time allowed under the then Rule 73(a). The court, contrary to appellant's argument, did not footnote the case, such appears to have been made by the publisher of Volume 700 of the Pacific Reporter, 2nd series.

It is respectfully submitted, that appellant has had sufficient time, having since the trial date of December 16, 1986, to prepare its Notice of Appeal and determine the appropriate fees required by the rules. The fact that appellant waited until near the end of the time allowed for appeal, and chose to use the United States Mail for attempted timely delivery to the court being appealed from should not be allowed to prejudice the respondent, Calvin D. Leach. Time of filing being such a material aspect of the appeal, being both mandatory and going to jurisdiction, appellant could have delivered the Notice of Appeal by another method which would have allowed it to know the problem with "proper fees" in time to make such adjustments as it considered necessary. The method of selecting the manner of forwarding the Notice of Appeal to the court was at all times wholly within the control of appellant, respondent had nothing to do with it, and accordingly respondent should not be prejudiced by appellant's choice of process.

This Court has, pursuant to the Rules, the right to dismiss an appeal. In the instant case, since there is no filing there is no appeal to dismiss. It does not exist. The Court, has the right to award attorney fees when, in its wisdom, it considers such are

appropriate. It is respectfully submitted that the failure of appellant to timely file an appeal, the responsive action of appellant to Petition for Rehearing of an action of its own lack of timeliness, and the necessity of respondent having to retain counsel to respond to appellant's Petition for Rehearing - all brought about by appellant's conduct and none whatsoever of respondent - suggest, even urge, an award of attorney fees to respondent for all aspects of this Petition for Rehearing.


Conclusion

In the case at bar, the failure of appellant to timely make payment of the required fees in the appropriate amount together with its presentment of the Notice of Appeal to the clerk of the Provo Eight Circuit Court, is fatal to it having filed an appeal. Having filed no appeal there is nothing before the Court of Appeal for further action in this matter. It is respectfully submitted the Court cannot make something from nothing, namely, cannot make an appeal to be considered where none exists.

It is further submitted that this situation is a case where the Court can properly award attorney fees for the expenses to which respondent has been put through the failure of appellant to timely file an appeal, this petition for rehearing requiring the respondent

added and unnecessary expense. It is respectfully submitted that a fee of \$375.00 is appropriate to be awarded to respondent in respect to this rehearing petition.

DATED this 21st day of May 1987.


DeLOY M. SALLENBACK
Attorney for Respondent

MAILING CERTIFICATE

I hereby certify that on this 22 day of May, 1987, I caused the foregoing Memorandum in Response to Petition for Rehearing, to be delivery by hand to the offices of the Attorney for Plaintiff-Appellant, James D. Porter, 311 South State ,Suite 380, Salt Lake City, Utah 84111, and Floyd A. Jensen, Attorney, The Mountain State Telephone and Telegraph Company, 250 Bell Plaza, 16th Floor, Salt Lake City, Utah 84111.

